Supreme Court, U. S.
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No. 77-6219

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

THOMAS BALDASAR,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondents.

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND JUDICIAL DISTRICT

BRIEF FOR RESPONDENTS

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BRIEF FOR RESPONDENTS

OPINIONS BELOW

The opinion of the Illinois Appellate Court, Second Judicial District, is reported at 52 Ill. App. 3d 305, 367 N.E. 2d 459 (2d Dist. 1977), and is reproduced in the Appendix (hereinafter referred to as "A.") at pages A. 19-30. The unreported order of the Illinois Supreme Court denying a petition for leave to appeal is reproduced at A. 31.

JURISDICTION

The Illinois Supreme Court denied a petition for leave to appeal on November 23, 1977. The petition for writ of

certiorari was timely filed in this Court on February 18, 1978, and was granted on March 19, 1979. The jurisdiction of this Court is invoked by petitioner under the provisions of 28 U.S.C. § 1257 (3).

QUESTION PRESENTED

Whether a prior uncounseled misdemeanor conviction, valid under *Scott* v. *Illinois*, may be used to increase a sentence of imprisonment for a subsequent conviction under an enhanced penalty statute.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, that:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ill. Rev. Stat., 1973, ch. 38, § 16-1 provides, in pertinent part, that:

> (e) Sentence.
>
> (1) Theft of property not from the person and not exceeding $150 in value is a Class A misdemeanor. A second or subsequent offense after a conviction of any type of theft is a Class 4 felony.
>
> (2) Theft of property from the person or exceeding $150 is a Class 3 felony.

Ill. Rev. Stat., 1975, ch. 38, § 1005-8-1 provides, in pertinent part, that:

(b) The maximum term shall be set according to the following limitations: . . .

(5) for a Class 4 felony, the maximum term shall be any term in excess of one year not exceeding 3 years. . . .

(c) The minimum term shall be set according to the following limitations: . . .

(5) for a Class 4 felony, the minimum term shall be one year in all cases. . . .

(e) Every indeterminate sentence shall include as though written therein a parole term in addition to the term of imprisonment. Subject to earlier termination under Section 3-3-8, [footnote omitted] the parole term shall be as follows: . . .

(3) for a Class 4 felony, 2 years.

Ill. Rev. Stat., 1975, ch. 38, § 1005-8-3 provides, in pertinent part, that:

(a) A sentence of imprisonment for a misdemeanor shall be for a determinate term according to the following limitations:

(1) for a Class A misdemeanor, for any term less than one year.

Ill. Rev. Stat., 1975, ch. 38, § 1005-8-6 provides, in pertinent part, that:

(a) Offenders sentenced to a term of imprisonment for a felony shall be committed to the penitentiary system of the Department of Corrections. . . . A person sentenced for a felony may be assigned by the Department of Corrections to any of its institutions, facilities or programs.

(b) Offenders sentenced to a term of imprisonment for less than one year may be committed to the custody of the sheriff. All offenders above the age of 17 years who are sentenced to 60 days or more to jail may be committed to the Department of Corrections. . . . A person committed to the Department of Corrections for less than one year may be assigned by the Department to any of its institutions, facilities or programs.

STATEMENT OF THE CASE

On April 8, 1975, Mr. Sol Valiery, a store manager for the Jewel Food Stores, swore out a criminal complaint charging Thomas Baldasar (hereinafter referred to as "petitioner") with the misdemeanor offense of Theft (under $150.00). (A. 13-14) Subsequently, on May 1, 1975, petitioner appeared in the Circuit Court of Cook County, Illinois, at which time he entered a plea of not guilty and waived a jury trial. (A. 15) However, he was subsequently found guilty of the offense by the Honorable Thomas Cawley.(A. 15) Judge Cawley sentenced petitioner to one (1) year of probation and fined him $159.00. (A. 15) This conviction and sentence has never been appealed.

Approximately seven and one-half (7½) months later, petitioner was charged, by way of Information, with the felony offense of Theft.[1] (A. 2) This latter charge was brought in the Circuit Court of DuPage County, Illinois. (A. 2) The Information alleged that petitioner had:

> [E]xerted unauthorized control over property of Montgomery Ward and Co., Inc., being one Dial Massage, having a total value of less than $150.00, intending to deprive Montgomery Ward and Co., Inc., permanently of the use and benefit of said property. (A. 2)

The Information also alleged that petitioner had previously been convicted of Theft on May 1, 1975. (A. 2)

Petitioner was brought to trial, before a jury, on July 2, 1976. (RC. 95; R. 1)[2] The State presented testimony from two

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[1] *See Ill. Rev. Stat.*, 1973, ch. 38, § 16-1(e), which is set out verbatim under "Constitutional and Statutory Provisions Involved". This statute provides that theft of property not from the person and not exceeding $150.00 in value is denominated a Class A misdemeanor. Theft of property from the person or property exceeding $150.00 in value is denominated a Class 3 felony. Finally, a second or subsequent offense after a prior misdemeanor theft conviction is a Class 4 felony.

[2] "RC." refers to the common law record (*i.e.*, pleadings, motions, etc.), while "R." refers to the trial transcript.

witnesses in support of the charge. The first witness was a Dan Timmerman, who was the security manager for the Montgomery Ward Department Store located in the Yorktown Shopping Center in Lombard, Illinois. (R. 32) Mr. Timmerman stated that on November 13, 1975, while working at the Yorktown store, he received a call from a Mary Wilkerson, who was also on the security staff at that time. (R. 33) In response to that call, he proceeded to the store's camera department where he observed a man "looking suspicious". (R. 33) Mr. Timmerman followed this person as he walked over to the cosmetics department. (R. 33) At that time, Mr. Timmerman went upstairs to a hidden observation booth or "blind". (R. 33-34) From that vantage point he observed the customer approach the shelf where shower massage heads were located. (R. 34) He watched as the customer took one of the units off the shelf; put it underneath his arm; and walk directly out of the store into the shopping mall. (R. 34) Mr. Timmerman then proceeded to make an in-court identification of the petitioner as being the man whom he had observed. (R. 34-35)

People's Exhibit No. 1 was identified by Mr. Timmerman as being the shower massage head in question. (R. 35) The witness then testified as to the path which the petitioner took out of the store and the fact that he passed two cash registers on his way out without paying for the shower massage head. (R. 35-36) Mr. Timmerman related that he stopped the petitioner when he was approximately 100 feet outside the store and that when he asked the petitioner for a receipt, the petitioner replied he didn't have one but that he had paid for the item. (R. 37) The petitioner was then escorted back to the store's security office where he was placed under arrest. (R. 37)

The security manager also identified People's Exhibit No. 2, which was a copy of the charter to do business in Illinois issued to Montgomery Ward and Co., Inc. by the Illinois Secretary of State's Office. (R. 39) People's Exhibits Nos. 1

and 2 were thereafter admitted into evidence. (R. 40-42) Finally, Mr. Timmerman testified that the retail value of the shower massage head was $29.88. (R. 43) After a short cross-examination (R. 43-44), and re-direct examination (R. 45), the witness was excused. (R. 45)

The only other witness called by the State was Mr. Sol Valiery. (R. 45) Mr. Valiery stated that on May 1, 1975, he testified against the petitioner, whom he identified in-court, in a criminal case heard at the Oak Park, Illinois, Village Hall Court Room. (A. 5) The charge against the petitioner at that time was "shoplifting". (A. 5) Mr. Valiery related that after a bench trial the judge found the petitioner guilty and sentenced him to a fine of $159.00. (A. 6) Mr. Valiery stated that he had signed the complaint against the petitioner and he identified his signature on People's Exhibit No. 3.

The State then offered into evidence said exhibit which consisted of the complaint and the circuit court "half-sheet" (*i.e.* the court docket) from the prior criminal conviction. (A. 7) Defense counsel immediately interposed an oral objection (A. 7), and the court proceedings were adjourned to the judge's chambers, outside the presence and hearing of the jury. (A. 7)

Once in chambers defense counsel offered a written objection (A. 3), and orally expounded upon it. (A. 7-9) Counsel's argument was two-fold. First, counsel alleged that there was a discrepancy between the middle initial of the person listed on the Cook County complaint and the middle initial of the petitioner. (A. 3, 7)[3] Secondly, counsel alleged that there had been no affirmative showing that the petitioner had been represented by counsel at the Cook County trial and that Illinois case law required an affirmative showing of legal representation. (A. 3, 7) The trial court denied defense counsel's motion stating that the cases cited by counsel involved

[3] This allegation was, of course, moot since the State had Mr. Valiery identify the petitioner in open court as being the same person involved in the Cook County proceeding. (A. 7)

felonies and "On the basis of . . . [this case] not being a felony, I will deny your motion." (A. 9) Thereafter, People's Exhibit No. 3 was admitted into evidence. (A. 9)

On cross-examination, Mr. Valiery testified that the defendant was not represented by counsel at the Cook County trial. (A. 10) The witness was then excused and the State rested its case-in-chief. (R. 55-56)

The only witness for the defense was the petitioner. (R. 57) He testified that on November 13, 1975, he entered the Montgomery Ward Store on the lower level and was carrying the Dial Massage with him at that time. (R. 58) He was intending to return the item for which he did not have a sales slip. (R. 58-59) The petitioner testified that he went to the cosmetics department, where he had previously purchased the item, but that he saw no one at the cash register. (R. 59) After waiting for a sales person to come to the register, he went browsing in the nearby paperback book department at which point he was apprehended by security personnel. (R. 60) The petitioner stated that he told a security man that he was returning the merchandise in question but that he did not have a receipt. (R. 61) He was then taken to the security office. (R. 61)

On cross-examination, the petitioner stated that he had bought the item approximately one week prior to November 13th and that it had cost $29.00 plus tax. (R. 61) He reiterated most of his previous testimony and insisted that he had never left the store before being apprehended. (R. 63-64) According to his testimony, he was apprehended only ten (10) or fifteen (15) feet from the cosmetics department. (R. 64) He also stated that he never took a shower head off any shelf while he was in the store. (R. 64) The witness was then excused and defense rested its case. (R. 65)

After the defense rested, the State introduced, for rebuttal purposes, a certified copy of a prior Armed Robbery conviction

to impeach the petitioner's credibility. (R. 65-67) This prior conviction (People's Exhibit No. 4) was admitted into evidence without objection. (R. 67-68) The State then rested. (R. 69)

Final arguments were made to the jury (R. 75-89), after which the jury was instructed (R. 89-95), and allowed to retire for deliberations. (R. 95) After a short period of time (RC. 95), the jury returned a verdict of guilty. (R. 97) The petitioner was subsequently sentenced to the Illinois Department of Corrections for a period of imprisonment of not less than one (1) nor more than three (3) years. (A. 16-18; R. 106) A Notice of Appeal was timely filed on September 8, 1976. (RC. 85)

Subsequently, on August 30, 1977, the Illinois Appellate Court, Second Judicial District, affirmed the petitioner's conviction and sentence in a two (2) to one (1) decision. *People* v. *Baldasar*, 52 Ill. App.3d 305, 367 N.E.2d 459 (2d Dist. 1977). (A. 19-30) The appellate court held that:

> [t]he *Argersinger* [*Argersinger* v. *Hamlin*, 407 U.S. 25 (1972)] prohibition of imprisonment for any offense after an uncounseled conviction was limited in application to a single case in which a defendant was convicted and was not intended to limit the use of a properly obtained, although uncounseled, conviction in future proceedings based upon subsequent conduct of a defendant. We believe this to be true whether such use of the conviction is sought to be made for purposes of impeachment, sentence determination or, as in the instant case, to establish an element of a second or subsequent offense prosecution for which an enhanced penalty might be imposed.
>
> We do not accept defendant's contention that use of his prior, uncounseled theft conviction results either directly or collaterally in imprisonment for that offense.
>
> 367 N.E.2d at 463. (A.24)

On November 23, 1977, the Illinois Supreme Court denied a petition for leave to appeal. (A. 31) This Court granted a petition for writ of certiorari on March 19, 1979.

SUMMARY OF ARGUMENT

Petitioner's 1975 uncounseled misdemeanor conviction is valid under *Scott* v. *Illinois*, ____ U.S. ____, 99 S.Ct. 1158 (March 5, 1979). Valid criminal convictions can be used for certain collateral purposes, one of which is to enhance punishment for a subsequent criminal violation of certain state laws. Since the petitioner's 1975 misdemeanor conviction is valid and since the State of Illinois properly alleged and proved this conviction at petitioner's second theft trial, petitioner's present conviction and sentence are valid and constitutional.

Any other conclusion would substantially undercut this Court's previous rulings in *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972), and *Scott* v. *Illinois*, *supra*. A decision in favor of the petitioner would place a much heavier burden upon trial judges when they are called upon to make a pre-trial "predictive evaluation" as to the need for appointment of counsel. Indeed, the net effect may very well be that counsel would be appointed in most, if not all, misdemeanor cases where imprisonment was an authorized penalty, a result which this Court has previously declined to require.

Petitioner's argument that he was imprisoned as a direct result of his original, uncounseled misdemeanor conviction overlooks the fact that his sentence of imprisonment was for the second conviction only and was not an additional or delayed punishment for the original misdemeanor theft offense. Furthermore, it was petitioner's unilateral decision to commit the second theft which has led to his imprisonment and not the fact that he was previously convicted of misdemeanor theft.

Petitioner's argument as to the lack of reliability of the uncounseled misdemeanor conviction must similarly fail. Petitioner has never questioned the accuracy, either factually or legally, of the uncounseled misdemeanor conviction. Moreover, since the uncounseled conviction is valid under *Scott* v. *Illinois*, *supra*, reliance on cases such as *Burgett* v. *Texas*, 389 U.S. 109 (1967), and *Loper* v. *Beto*, 405 U.S. 473 (1972), is misplaced.

ARGUMENT

AN UNCOUNSELED MISDEMEANOR CONVICTION, VALID UNDER *SCOTT* V. *ILLINOIS*, MAY BE USED TO INCREASE A SENTENCE OF IMPRISONMENT FOR A SUBSEQUENT CONVICTION UNDER AN ENHANCED PENALTY STATUTE.

In the recently decided case of *Scott* v. *Illinois*, ____U.S. ____, 99 S. Ct. 1158 (March 5, 1979), this Court upheld the validity of an uncounseled misdemeanor conviction. In so doing, this Court reaffirmed its previous ruling in *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972), wherein it was stated:

> We hold, therefore, that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial. [footnote omitted]
>
> 407 U.S. at 37.

The *Scott* decision explains the above-quoted language from *Argersinger* in the following terms:

> Although the intentions of the *Argersinger* Court are not unmistakenly clear from its opinion, we conclude today that *Argersinger* did indeed delimit the constitutional right to appointed counsel in state criminal proceedings. [footnote omitted] Even were the matter *res nova*, we believe that the central premise of *Argersinger*—that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment—is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel.... We therefore hold that the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense.
>
> 99 S. Ct. at 1162.

Thus, there can be no disputing the fact that petitioner's 1975 misdemeanor theft conviction is valid. Indeed, petitioner has conceded its validity both in this Court (Brief for petitioner at 13), as well as in the Illinois Appellate Court. *People* v. *Baldasar*, 52 Ill. App.3d 305, 367 N.E.2d 459, 461 (2d Dist. 1977). (A.20)

A valid criminal conviction can be used for certain collateral purposes, one of which is to enhance punishment for a subsequent criminal violation of certain state laws.[4] In the instant case, as well as in *Scott v. Illinois*, the petitioner was convicted of misdemeanor theft; that is, theft of property not exceeding $150 and not from the person. *Scott v. Illinois, supra* at 1159; *People v. Baldasar, supra* at 461. (A.20) The relevant statute [*Ill. Rev. Stat.*, 1973, ch. 38, § 16-1(e)] provides that the first such conviction is a Class A misdemeanor, punishable by a fine and/or incarceration for up to one (1) year. *Ill. Rev. Stat.*, 1975, ch. 38, §§ 1005-5-3(d) and 1005-8-3(a)(1). However, a second or subsequent conviction for the same type of offense is denominated a Class 4 felony, punishable by incarceration for a minimum of one (1) year and a maximum of three (3) years. *Ill. Rev. Stat.*, 1975, ch. 38, § 1005-8-1. In order to convict a person for a felony, the state is required to allege, and prove, the prior misdemeanor conviction. *People v. Ramey*, 22 Ill. App.3d 916, 317 N.E.2d 143, 147 (2d Dist. 1974). This requirement was, of course, met in the instant case.

Since the underlying misdemeanor theft conviction is valid and since the state properly alleged and proved said conviction at the trial of petitioner on the instant charge, it is submitted that petitioner's present conviction and sentence are valid and constitutional. Simply stated then, the syllogism that supports

[4] An extensive, though not necessarily exhaustive, list of the crimes in Illinois which provide for enhancement of sentence upon a subsequent conviction can be found in footnote 1 of the *Baldasar* appellate court opinion. *People v. Baldasar, supra* at 462. (A.22)

the State's position is as follows. Petitioner's underlying misdemeanor conviction is valid. Valid convictions can be used for certain collateral purposes, among which is enhancement of sentence. Therefore, the collateral use of an uncounseled misdemeanor conviction for enhancement purposes is proper. *See generally*, Note, *Argersinger v. Hamlin And The Collateral Use Of Prior Misdemeanor Convictions Of Indigents Unrepresented By Counsel At Trial*, 35 Ohio State Law Journal 168, 183 (1974); *Griffin v. Blackburn*, 594 F.2d 1044 (5th Cir. 1979); *Alexander v. State*, 527 S.W.2d 927, 930-32 (Ark. 1975) (Fogleman, J., dissenting).[5]

[5] Petitioner contends that a majority of those courts which have considered this issue have prohibited the use of uncounseled misdemeanor convictions for later enhancement purposes. Brief for petitioner at 18-24. However, petitioner overlooks the fact that all the opinions upon which he relies were decided prior to *Scott* v. *Illinois*. The one case decided since *Scott* has strongly supported the collateral use of uncounseled misdemeanor convictions. *Griffin* v. *Blackburn*, 594 F.2d 1044 (5th Cir. 1979). In *Griffin*, the Fifth Circuit was faced with the question of the use of uncounseled misdemeanor convictions for impeachment purposes at a subsequent trial. After noting the internal conflict in decisions which had arisen within the Court of Appeals since the decision in *Argersinger* [*Compare Cottle* v. *Wainwright*, 477 F.2d 269 (5th Cir. 1973), *vacated on other grounds*, 414 U.S. 895 (1973), *with Thomas* v. *Savage*, 513 F.2d 536 (5th Cir. 1975), *and Potts* v. *Estelle*, 529 F.2d 450 (5th Cir. 1976)], the Court referred to this Court's opinion in *Scott* and noted that the opinion, "[I]s short, broad and grounded in basic principles. It displays no disposition to distinguish between possible effects, uses or consequences of such convictions. The authorities it cites as being in conflict are quite disparate, factually. Logically, if a conviction is valid for purposes of imposing its own pains and penalties—the 'worst' case—it is valid for all purposes." 594 F.2d at 1046.

Moreover, even some of the jurisdictions which, prior to *Scott*, appeared to support petitioner did, in fact, allow uncounseled misdemeanor convictions to be used for certain collateral purposes for which imprisonment might be imposed. *State* v. *Love*, 312 So.2d 675

(footnote continued on following page)

Any other conclusion would substantially undercut this Court's decisions in *Argersinger* and *Scott* and, perhaps more importantly, create untold confusion among state and federal courts as to the collateral uses of valid prior convictions. The essence of this Court's holdings in *Argersinger* and *Scott* is that a trial judge is able to make a "predictive evaluation" as to the likelihood of imposing imprisonment in the case before him prior to the commencement of trial. *Argersinger v. Hamlin,* 407 U.S. at 42 (Burger, C.J., concurring). However, if petitioner's views are adopted by this Court a trial judge would have to have a gift of prophecy as to a defendant's future behavior when evaluating the need for appointed counsel prior to trial on a misdemeanor charge. Indeed, local prosecutors might very well insist upon counsel in most, if not all, cases so as to preserve the later use of the conviction for enhancement or other collateral purposes. Essentially, defendants would receive appointed counsel in most, if not all, misdemeanor cases in which imprisonment was an authorized penalty, a result which this Court, with full awareness of the various options, declined to require in *Argersinger* and *Scott*. *Scott v. Illinois, supra* at 1162, fn. 4; Note, *Argersinger v. Hamlin And The Collateral Use Of Prior Misdemeanor Convictions Of Indigents Unrepresented By Counsel At Trial, supra* at 184.

Petitioner's main argument in support of his position is that he was, in fact, imprisoned as a direct result of his original,

(footnote continued from preceding page)

(La. App. 2d Cir. 1975); *State* v. *Sanchez,* 110 Ariz. 214, 516 P.2d 1226 (1973); *See, Whorley* v. *Brillhart,* 373 F. Supp. 83 (E.D. Va. 1974).

In any event, respondents believe that the better view among pre-*Scott* cases can be found in decisions such as *Aldrighetti* v. *State,* 507 S.W.2d 770 (Tex. Crim. App. 1974); *Nelson* v. *Tullos,* 323 So.2d 539 (Miss. 1975); and *State* v. *McGrew,* 127 N.J. Super. 327, 317 A.2d 390 (1974), as well as the dissenting opinions in *Alexander* v. *State,* 527 S.W.2d 927, 930 (Ark. 1975); *City of Monroe* v. *Fincher,* 305 So.2d 108, 110 (La. 1974); and *Morgan* v. *State,* 235 Ga. 632, 221 S.E.2d 47, 48 (1975).

uncounseled misdemeanor conviction. Brief for petitioner at 11-14. The fallacy of this argument is that his sentence of imprisonment was for the *second* conviction; it was not an additional or delayed punishment for the original offense. *Cf. Spencer* v. *Texas,* 385 U.S. 554, 559-60 (1967); *McDonald* v. *Massachusetts,* 180 U.S. 311, 312 (1901); *People* v. *Kirkrand,* 397 Ill. 588, 74 N.E.2d 813 (1947) (each case involving an habitual criminal statute). Furthermore, it was petitioner's unilateral decision to commit a second theft which has led to his imprisonment and not the fact that he had previously been convicted of misdemeanor theft. *Cf. Whorley* v. *Brillhart, supra* at 86-87 (construing an habitual traffic offender statute). Had he not committed the second theft there would not have been any deprivation of his liberty.[6] Certainly, under these circumstances petitioner's ultimate imprisonment cannot fairly be characterized as a "direct result" of his first conviction.

Finally, relying upon this Court's decisions in *Burgett* v. *Texas,* 389 U.S. 109 (1967), and *Loper* v. *Beto,* 405 U.S. 473 (1972), petitioner argues that uncounseled convictions lack the degree of reliability necessary to support an enhanced punishment resulting in imprisonment. Brief for petitioner at 14-17. Yet petitioner has never argued that the uncounseled conviction in his case was factually or legally incorrect. Indeed, he conceded its validity before the Illinois Appellate Court. *People* v. *Baldasar, supra* at 461. (A.20) And it is the validity of that conviction which distinguishes this case from *Burgett* or *Loper.* For in those two cases, this Court was dealing with an uncounseled felony conviction which was void under *Gideon* v.

[6] In fact, the trial court could have placed petitioner on probation for the second offense. *Ill. Rev. Stat.,* 1975, ch. 38, § 1005-5-3(d)(1). Additionally, had petitioner been tried without reference to the first conviction he still could have been imprisoned for up to one year. Thus, the difference between an enhanced conviction with counsel and a simple conviction for misdemeanor theft with counsel is the length of imprisonment and not the fact of imprisonment itself.

Wainwright, 372 U.S. 335 (1963). However, since this petitioner's original conviction is valid, there is no reason to question its accuracy or to deny its collateral use as was true in *Burgett* and *Loper*.[7]

Respondents submit that since petitioner's first conviction was valid, it may be used for the collateral purpose of enhancement of sentence upon a second, unrelated conviction. Any other conclusion would completely abrogate this Court's decisions in *Argersinger* and *Scott*.

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[7] It should be noted that the Illinois Appellate Court, relying on *Burgett* v. *Texas*, *supra*; *Loper* v. *Beto*, *supra*; and *United States* v. *Tucker*, 404 U.S. 443 (1972), has recently reversed and remanded a criminal conviction where the trial judge considered, both for impeachment purposes and for imposing sentence, a prior uncounseled theft conviction *where the defendant had been sentenced to imprisonment* in violation of *Argersinger* v. *Hamlin*, *supra*. *People* v. *Carter*, 72 Ill.App.3d 871, 391 N.E.2d 427 (1st Dist. 1979).

CONCLUSION

For the foregoing reasons, respondents pray that the judgment of the Illinois Appellate Court, Second Judicial District, affirming the conviction and sentence of the petitioner, be affirmed.

Respectfully submitted,

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